RE CHE KU ROHAIDA CHE KU SIN, EX P PUBLIC FINANCE BHD

HIGH COURT MALAYA, KUALA TERENGGANU
NIK HASHIM J
[BANKRUPTCY NO: 29-94-2000]
25 NOVEMBER 2001

BANKRUPTCY: *Creditor's petition - Notice to oppose - Bankruptcy Rules 1969, r. 18 - Whether a mandatory provision - Non-compliance thereof - Whether fatal - Bankruptcy Rules 1969, r. 117*

BANKRUPTCY: *Petition - Presentation - Petition signed by some person with lack of authority - Failure to comply with r. 215 of the Bankruptcy Rules 1969 and s. 133 of the Bankruptcy Act 1967 - Whether fatal - Whether existence of authority a prerequisite for presentation of a petition*

This was an appeal against the decision of the deputy registrar who had allowed the notice by debtor to oppose the creditor's petition and dismissed the creditor's petition (encl. 6A) with costs. The creditor submitted that other than the notice of intention to oppose under r. 117 of the Bankruptcy Rules 1969 ('the Rules') the debtor must also file an affidavit in support or comply with r. 18 of the Rules and that failure to do so was fatal to the debtor's objections to the creditor's petition. The debtor contended that the creditor's petition was defective under r. 215 of the Rules and s. 133(a) of the Bankruptcy Act 1967 ('the Act') for lack of authority on the person who signed the petition.

Held:

[1] For the purpose of opposing the creditor's petition under r. 117, there was no need for a debtor to file an affidavit in support of the notice or to comply with r. 18 of the Rules. A notice in Form 16 was sufficient. The debtor had complied with the correct mode of opposition to the creditor's petition under r. 117 of the Rules. (pp 438 e-f & 439 e-f)

[2] The creditor's petition was defective because it failed to comply strictly with the provisions of r. 215 of the Rules and s. 133(a) of the Act as the petition was signed by some person without any particulars of his name or authority. The failure to comply with the provisions was fatal to the petition. Thus the existence of the authority was a prerequisite for the presentation of a petition. (p 441 c-d)

[Appeal dismissed with costs.]

Case(s) referred to:
Datuk Lim Kheng Kim v. Malayan Banking Bhd [1993] 3 CLJ 324 ***(refd)***
Development & Commercial Bank Berhad v. Datuk Ong Kian Seng [1995] 3 CLJ 307 ***(refd)***
Hong Kim Sime v. Malayan Banking Bhd [1999] 3 CLJ 731 ***(refd)***
J Raju M Kerpaya v. Commerce International Merchant Bankers Bhd [2000] 3 CLJ 104 ***(refd)***
Re Chen Sing Chew, ex p Oriental Tin Smelters Sdn Bhd [1974] 2 MLJ 69 ***(refd)***
Re Lim Hong Kee David [1995] 4 CLJ 627 ***(refd)***
Re Mohd Tajuddin Mohd Jali, ex p Perwira Habib Bank (M) Bhd [2000] 5 CLJ 526 ***(refd)***
Samuel Pakianathan Jabamanikam, ex p Perwira Habib Bank (M) Bhd [1997] 5 MLJ 737 ***(refd)***
Sobri Arshad v. Associated Tractors Sdn Bhd [1991] 1 CLJ 798 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, s. 133(a)
Bankruptcy Rules 1969, rr. 18, 117, 215
Contracts Act 1950, s. 149

For the judgment creditor - Rita Phuah (Wong Yoke Ping); M/s Lai, Yong & Rita
For the judgment debtor - Jacob Goldie; M/s Jacob Goldie & Toh

Reported by Suhainah Wahiduddin

JUDGMENT

Nik Hashim J

Background

This is an appeal against the decision of the learned deputy registrar, who on 14 April 2001, allowed the notice by debtor to oppose the creditor's petition dated 16 October 2000 (encl. 13A) and dismissed the creditor's petition dated 25 July 2000 (encl. 6A) with costs.

Issues

Essentially, there are two issues for determination in this appeal:

(1) Whether the debtor by the notice (encl. 13A) complied with the prescribed mode of opposition to the creditor's petition under r. 117 of the Bankruptcy Rules 1969 (the Rules).

(2) Whether the creditor's petition (encl. 6A) was defective under r. 215 and s. 133(a) of the Bankruptcy Act 1967 (the Act) for lack of authority on the person who signed the petition.

Contentions Of The Parties

With regard to the first issue, learned counsel for the judgment creditor submitted in her written submission that other than the notice of intention to oppose under r. 117 of the Rules, the debtor must also file an affidavit in support or comply with r. 18 of the Rules. Failure to do so by the debtor is fatal to her objections to the creditor's petition. Learned counsel cited *Datuk Lim Kheng Kim v. Malayan Banking Bhd* [1993] 3 CLJ 324 and *Development & Commercial Bank Berhad v. Datuk Ong Kian Seng @ Ong Kin Cheang* [1995] 3 CLJ 307 and *Re Lim Hong Kee David* [1995] 4 CLJ 627 in support.

On the second issue, learned counsel for the judgment debtor argued forcefully that the petition was defective because of lack of authority on the part of the person who signed the petition on 25 July 2000, and in support of his argument, learned counsel quoted *Re Chen Sing Chew, ex p Oriental Tin Smelters Sdn Bhd* [1974] 2 MLJ 69.

Findings Of The Court

Issue No. (1)

In the light of the foregoing submissions, it is therefore necessary to reproduce the provisions of rr. 18 and 117 of the Rules. They are:

> Rule:
>
> 18. Applications to be made by summons in chambers.
>
> (1) Except where these Rules or the Act otherwise provide, every application to the Court shall, unless the Chief Justice otherwise directs, be made by summons in chambers supported by affidavit.
>
> (2) Notwithstanding subrule (1), where applicable, all applications filed by way of motion before the commencement of these Rules may be heard by the Registrar as if they were applications made under such Rules.
>
> Rule
>
> 117. Debtor intending to show cause.
>
> Where a debtor intends to show cause against a petition he shall file a notice with the Registrar specifying the statements in the petition which he intends to deny or dispute and transmit by post or otherwise to the petitioning creditor and his solicitor if known a copy of the notice three days before the day on which the petition is to be heard.

The provision under r. 117 has been considered in many cases. In the recent case of *J Raju M Kerpaya v. Commerce International Merchant Bankers Bhd* [2000] 3 CLJ 104, the Court of Appeal after having considered all relevant

authorities including the Supreme Court case of *Datuk Lim Kheng Kim* and the Federal Court case of *Development & Commercial Bank Berhad*, on the various methods of opposing or setting-aside the various stages in bankruptcy proceedings, came to the following judgment:

> In our judgment, the following propositions may be distilled from a rationalisation of the authorities we have thus far discussed.
>
> (1) When determining an issue under the Act, it is incumbent upon the court to accord its provisions a strict construction.
>
> (2) ...
>
> (3) ...
>
> (4) ...
>
> (5) ...
>
> (6) ...
>
> (7) A debtor who opposes a creditor's petition must comply with the procedure prescribed by r. 117 of the Rules. If he does not do so, any challenge he may mount is liable to fail for non-compliance of the Rules.

Thus, by reason of the said judgment and the very clear provision of r. 117, the correct procedure for a debtor to oppose a creditor's petition during the hearing of the same is to file and serve only a notice in Form 16 specifying the statements in the petition which the debtor intends to oppose. In my view, for the purpose of opposing the creditor's petition under r. 117, there is no need for a debtor to file an affidavit in support of the notice or to comply with r. 18. A notice in Form 16 is sufficient.

Rule 18 is a general provision with a proviso which means that the r. 18 procedure of applications by way of summons in chambers with a supporting affidavit are not applicable where there is a specific rule applicable. The specific rule to oppose a creditor's petition is r. 117 which specifically stipulates the procedure that is by filing a Form 16 notice and nothing else.

Example of cases which make no reference to the requirement for the filing of a summons in chambers supported by an affidavit pursuant to r. 18 are as follows:

(1) The Federal Court decision of *Hong Kim Sime v. Malayan Banking Bhd* [1999] 3 CLJ 731 at p. 734:

> By a notice dated 24 June 1994 taken out under r. 117 of the Bankruptcy Rules 1969, the judgment debtor objected to the validity of the bankruptcy petition contending that the verifying affidavit in support, being attested by a justice of the peace in Sabah, was defective.

(2) The Court of Appeal decision of *J Raju Kerpaya*, *supra*.

(3) The High Court decision of *Re Mohd Tajuddin Mohd Jali, ex p Perwira Habib Bank (M) Bhd* [2000] 5 CLJ 526 at p. 531:

> In the instant case, the judgment debtor has filed the notice of intention to oppose the creditor's petition pursuant to r. 117 of the Bankruptcy Rules 1969. In the circumstances, in my view the judgment debtor has a right to be heard. *Re Ngan Chin Wen; ex p Moscow Narodny Bank Leo*.

The above cases clearly illustrate that a judgment debtor has a right to be heard when he files a notice pursuant to r. 117.

The three cases of *Datuk Lim Kheng Kim, Development & Commercial Bank Berhad* and *Re Lim Hong Kee David* cited by the creditor's counsel are distinguishable from the present case. They were decided based on the grounds that the judgment debtor failed to file a notice in Form 16 pursuant to r. 117 but instead merely filed a affidavit in opposition. Moreover their affidavits in opposition raised matters outside the creditor's petition and therefore, the courts ruled that they should have applied under the general provision of r. 18 by way of summons-in-chambers along with a supporting affidavit to make such a challenge.

In the instant case, however, the debtor was not raising anything outside the creditor's petition. The debtor strictly confined her objections to the petition as provided in r. 117. In the circumstances, I hold that the debtor has complied with the correct mode of opposition to the creditor's petition under r. 117 of the Rules. The learned deputy registrar was therefore right to allow the debtor's objections to be heard.

Issue No. (2)

The petitioner creditor in its petition (encl. 6A) commenced the action by stating "Kami (we), Public Finance Bhd" and in the premises, Public Finance Bhd must sign the petition. The petition contains an illegible signature of someone without designation. The petition was presented on 25 July 2000.

It was deposed in the affidavit affirmed on 21 July 2000 and verifying the creditor's petition (encl. 6B) that the deponent, Tan Teng Hoong, was duly authorised by the creditor to affirm the said affidavit and to present the creditor's petition on its behalf.

As a result of the opposition by the debtor's notice (encl. 13A) disclosing the defects in the petition, the deponent thereafter admitted in his affidavit affirmed on 7 February 2001 (encl. 14A), that he signed the petition, and that the creditor had *vide* the letter of authorisation dated 30 January 2001

(exh. "TTH1") duly authorised the deponent under the seal of the creditor to act on its behalf and also ratified any and all actions taken by the deponent earlier in the bankruptcy proceedings against the debtor.

In defending the validity of the petition, learned counsel for the creditor submitted that the authority although given after the date of the petition is valid by reason of the creditor ratifying the act of its agent by virtue of s. 149 of the Contracts Act 1950.

With respect, I do not agree with her. In my view, the law of contract of ratification of acts done by an agent on behalf of another under s. 149 of the Contracts Act has no application to bankruptcy proceedings in respect of r. 215 and s. 133(a) of the Act.

Section 133(a) states:

> (a) a corporation may act by any of its officers authorised in that behalf under the seal of the corporation.

Whereas r. 215 provides:

> Where a corporation presents a petition or takes any other action under this Act, this officer of the corporation may act in his own name, stating that he is such officer duly authorised under seal, but a petition may be presented by the corporation, and signed by the officer on its behalf. Any person chosen by the corporation to act for it as agent, is an "officer" within section 133, and if duly authorised under seal can act for the corporation.

Thus, by their provisions, it implies that the authority must be in existence when the petition is presented, and such authority cannot therefore be ratified retrospectively, though such authority may be granted for the future presentation of a petition in respect of acts of bankruptcy which may not have arisen at the date when the authority was given [see *Samuel Pakianathan Jabamanikam, ex p Perwira Habib Bank (M) Bhd* [1997] 5 MLJ 737.

However, in the case under discussion, there was only an illegible signature of someone without a designation. Learned counsel for the debtor rightly pointed out that there is nothing in the petition to show that the petition has been signed by the petitioner creditor or the authority of some other person duly authorised to sign the petition on behalf of the petitioner creditor as required by r. 215 and s. 133(a) of the Act on 25 July 2000 when the petition was presented. Further, the attestation by the solicitor in the petition fails to state who signed the petition and in what capacity was it signed.

The material aspect of the instant case is somewhat identical to the facts in *Re Chen Sing Chew, supra*. There, the judgment debtor raised objections to the creditor's petition *inter alia* on the grounds that there was lack of authority on the person who signed the petition. The bankruptcy petition was dated 27 October 1972 whereas the authority to the officer, one N Takai, was given after the date of the petition ie, on 23 October 1973. Wan Hamzah J (as he then was) upheld the debtor's objection and dismissed the petition, *inter alia*, on the grounds of lack of authority to commence the bankruptcy proceedings against the debtor.

With great respect, I am in full agreement with the learned judge's ruling. Similarly in the present case, the petition is defective for lack of authority on the person who signed the petition to commence the bankruptcy proceedings against the debtor. The petition fails to comply strictly with the provisions of r. 215 and s. 133(a) of the Act as the petition was signed by some person without any particulars of his name or authority. The failure to comply with the provisions is fatal to the petition. The authority must exist in order to present the petition. Thus, the existence of the authority is a prerequisite for the presentation of a petition. Accordingly, the creditor's letter of authorisation dated 30 January 2001 cannot therefore ratify the unauthorised petition. The petition was a nullity as at the date of its presentation on 25 July 2000.

In determining the two issues, the court accord the provisions in the Rules and the Act a strict construction in a manner most favourable to the debtor. Edgar Joseph Jr J (as he then was) in *Sobri Arshad v. Associated Tractors Sdn Bhd* [1991] 1 CLJ 798 at p. 800 aptly said:

> On a concluding note, bearing in mind that bankruptcy proceedings, if successful, would have harsh and penal consequences, meticulous compliance with the law is often necessary. The case of *In re North, ex p Hasluck* [1895] 2 QB 264 is authority for the proposition that the statute relating to bankruptcy should be construed in a manner most favourable to the person affected.

Thus, by reasons of the aforesaid matters, I hereby dismiss the appeal with costs and the petition at encl. 6A is dismissed.